

1992

West Valley City v. Dennis Streeter : Brief of Appellee

Utah Court of Appeals

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BRIEF

UT/

DOCKET NO.

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DOCKET NO. 920349

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

Plaintiff/Appellee

vs.

DENNIS STREETER,

Defendant/Appellant

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Case No. 920349-CA

Priority No. 2

BRIEF OF APPELLEE

On Appeal from the Third Circuit Court, West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable WILLIAM A. THORNE, Presiding

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OCT 9 1992

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

LIST OF ALL PARTIES TO THE PROCEEDING
IN THE THIRD CIRCUIT COURT

Pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, the parties to the action in the Third Circuit Court, West Valley Department, in and for Salt Lake County, State of Utah, captioned, *West Valley City, Plaintiff, v. Dennis Streeter, Defendant*, Civil No. 901001586MC (which, for the purposes of appeal, has been consolidated with the action captioned, *West Valley City, Plaintiff, v. Dennis L. Streeter, Defendant*, Civil No. 901001677MC), were as follows:

West Valley City¹

Plaintiff/Appellee

Dennis Streeter

Defendant/Appellant

¹The case was captioned *West Valley City v. Dennis Streeter* in the Third Circuit Court. Appellant Streeter has incorrectly captioned this appeal as *State of Utah v. Dennis L. Streeter*. The State of Utah is not a party to this action, nor is West Valley City prosecuting a state statute on behalf of the State of Utah. The ordinance at issue in this case is a West Valley City ordinance, and the proper Plaintiff is West Valley City.

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ADDENDA

- Addendum A: Articles of Incorporation of West Valley City
- Addendum B: 7 U.S.C. § 2156 - Animal Fighting Venture Prohibition
- Addendum C: Trial Court Decision on Motion to Dismiss, Dated January 27, 1992
- Addendum D: Order of the Trial Court Denying the Defendant's Motion to Dismiss, Dated June 18, 1992
- Addendum E: Order of the Trial Court Denying Defendant's Motion to Reconsider Defendant's Motion to Dismiss, Dated June 18, 1992

JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals, pursuant to Utah Code Ann. § 78-2a-3(2)(f).

STATEMENT OF THE ISSUES

West Valley City accepts Appellant Streeter's presentation of the issues presented on appeal and the appropriate standard of review.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

7 U.S.C. § 2156 See Addendum B

Utah Code Ann. § 10-1-103:

10-1-103. Construction.

The powers herein delegated to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law. 1977

Utah Code Ann. § 10-1-106:

10-1-106. Scope of act.

This act shall apply to all municipalities incorporated or existing under the law of the State of Utah except as otherwise specifically excepted by the home rule provisions of Article XI, Section 5 of the Constitution of the State of Utah. 1977

Utah Code Ann. § 10-3-1210:

10-3-1210. Function of the council.

The municipal council of a municipality adopting an optional form of government provided for in this part shall pass ordinances, appropriate funds, review municipal administration, and perform all duties that may be required of it by law. 1977

Utah Code Ann. § 10-8-47:

10-8-47. Intoxication -- Fights -- Disorderly conduct -- Assault and battery -- Petit larceny -- Riots and disorderly assemblies -- Firearms and fireworks --

False pretenses and embezzlement -- Sale of liquor, narcotics or tobacco to minors -- Possession of controlled substances -- Treatment of alcoholics and narcotics or drug addicts.

They may prevent intoxication, fighting, quarrelling, dog fights, cockfights, prize fights, bullfights, and all disorderly conduct and provide against and punish the offenses of assault and battery and petit larceny; they may restrain riots, routs, noises, disturbances or disorderly assemblies in any street, house or place in the city; they may regulate and prevent the discharge of firearms, rockets, powder, fireworks or any other dangerous or combustible material; they may provide against and prevent the offense of obtaining money or property under false pretenses and the offense of embezzling money or property in all cases where the money or property embezzled or obtained under false pretenses does not exceed in value the sum of \$100 and may prohibit the sale, giving away or furnishing of intoxicating liquors or narcotics, or of tobacco to any person under twenty-one years of age; cities may, by ordinance, prohibit the possession of controlled substances as defined in the Utah Controlled Substances Act, provided the conduct is not a class A misdemeanor or felony, and provide for treatment of alcoholics, narcotic addicts and other persons who are addicted to the use of drugs or intoxicants such that they substantially lack the capacity to control their use of the drugs or intoxicants, and judicial supervision may be imposed as a means of effecting their rehabilitation. 1981

Utah Code Ann. § 10-8-59:

10-8-59. Cruelty to animals.

They may prohibit cruelty to animals.

1953

Utah Code Ann. § 10-8-84:

10-8-84. Ordinances, rules and regulations -- Passage -- Penalties.

They may pass all ordinances and rules, an [and] make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city; and may enforce obedience to the ordinances with fines or penalties as they may deem proper, but the punishment of any offense shall be by fine not to exceed the maximum class B misdemeanor fine under Section 76-3-301 or by imprisonment not to exceed six months, or by both the fine and imprisonment. 1986

Section 23-5-104(8), West Valley City Municipal Code:

23-5-104. CRUELTY TO ANIMALS PROHIBITED.

(8) Animals for fighting:

- (a) It shall be unlawful for any person or corporation to raise, keep or use any animal, fowl or bird for the purpose of fighting or baiting; and for any person to be a party to or be present as a spectator at any such fighting or baiting of any animal or fowl; and for any person, firm or corporation to knowingly rent any building, shed, room, yard, ground or premises for any such purposes as aforesaid, or to knowingly suffer or permit the use of his buildings, sheds, rooms, yards, grounds or premises for the purposes aforesaid.
- (b) Law Enforcement Officers or Office of Animal Control officials may enter any building or place where there is an exhibition of the fighting or baiting of a live animal, or where preparations are being made for such an exhibition, and the Law Enforcement Officers may arrest persons there present and take possession of all animals engaged in fighting, or there found for the purposes of fighting, along with all implements or applications used in such exhibition. This provision shall not be interpreted to authorize a search or arrest without a warrant when such is required by law.

STATEMENT OF THE CASE

West Valley City accepts Appellant Streeter's presentation of the statement of the case.

RELEVANT FACTS

West Valley City accepts Appellant Streeter's presentation of the facts, with the following additions:

1. Streeter was charged by citation and information (R-1. 1; R-2. 1-2)² with violating § 23-5-104 of the West Valley City Municipal Code³. Section 23-5-104(8) provides that, "It shall be unlawful for any person or corporation to raise, keep or use any animal, fowl or bird for the purpose of fighting or baiting . . ."

2. In Case No. 901001586MC, Streeter specifically admitted conduct establishing the elements of the crime, and entered a conditional plea of guilty subject to retaining his right to challenge the constitutionality of the ordinance. (R-1. 17-24)

3. In Case No. 901001677MC, Streeter specifically admitted conduct establishing the elements of the crime, and entered a conditional plea of guilty subject to retaining his right to challenge the constitutionality of the ordinance. (R-1. 26-34)

²Case No. 901001586MC and Case No. 901001677MC were consolidated by the Court of Appeals under Case No. 92-0349CA. Because the trial court's record is numbered individually under each case number, all references to the Record shall be as follows: R-1 shall pertain to the Record in Case No. 901001586MC, and all references to R-2 shall pertain to Case No. 901001677MC.

³Throughout Appellant's Brief, Streeter incorrectly refers to the West Valley City Municipal Code as "Revised West Valley City Ordinances"/"RWVCO." Section 1-1-101 of the West Valley City Municipal Code reads as follows:

1-1-101. HOW CODE DESIGNATED AND CITED.

The ordinances embraced in the following chapters and sections shall constitute and be designated "The West Valley City Municipal Code," and may be so cited. Such Code may also be cited as the "West Valley City Code" or "Code."

SUMMARY OF ARGUMENT

POINT I

IT IS WITHIN THE POWER OF WEST VALLEY CITY TO ENACT § 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE, WHICH PROHIBITS ANY PERSON FROM RAISING, KEEPING OR USING ANY FOWL OR BIRD FOR THE PURPOSE OF FIGHTING.

West Valley City is an incorporated city, established pursuant to the provisions of Title 10 of the Utah Code. It derives its police power with regard to the prevention of cockfighting and its supporting activities from both specific grants of power and the general welfare provisions of Title 10. Utah case law clearly establishes that the City's police power should be liberally construed and that municipalities have wide discretion in the exercise of their police power in the public interest. Courts will not interfere with the City legislative body's use of police power as long as its use is reasonably related to providing for the public safety, health, morals and welfare. In this case, the prohibition against raising, keeping or using birds or fowl for the purpose of fighting is a reasonable use of the City's police power to further the legislative policy against animal fighting ventures. Furthermore, the West Valley City ordinance is not an extraterritorial criminal statute, but, rather, only regulates activity within West Valley City.

Appellant Streeter's argument is based on the false premise that West Valley City is a chartered city, and the cases upon which he relies are outdated and have been overruled.

POINT II

SECTION 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE IS NOT VOID FOR VAGUENESS.

Section 23-5-104(8) of the West Valley City Municipal Code contains no uncertain or confusing terms, and is not vague on its face. Also, the ordinance is not vague in its application to Streeter. He has admitted committing the specific elements of the crime. Streeter lacks standing to raise questions of vagueness regarding hypothetical fact situations.

POINT III

SECTION 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE IS NOT UNCONSTITUTIONALLY OVER- BROAD.

Section 23-5-104(8) of the West Valley City Municipal Code is not over-broad, and does not impinge upon innocent conduct. The ordinance contains a clear mental element which requires that game birds be raised, kept or used "for the purpose of fighting." This mental element protects those who may innocently own game birds, but who have no intent that the birds fight. Also, Streeter has no standing to raise hypothetical challenges to the ordinance, and the ordinance is clearly not over-broad as it relates to the facts of his case.

POINT IV

SECTION 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE IS NOT PREEMPTED BY THE ANIMAL WELFARE ACT AMENDMENT OF 1976, 7 U.S.C. § 2156, NOR DOES IT UNCONSTITUTIONALLY RESTRICT THE RIGHT TO TRAVEL.

The Animal Welfare Act Amendment of 1976, 7 U.S.C. § 2156, has a specific section expressing Congress' intent to not preempt state law except in cases of direct and irreconcilable conflict with the federal statute. 7 U.S.C. § 2156(h). There is no direct and irreconcilable conflict between the federal statute and the West Valley City ordinance. To the contrary, the West Valley City ordinance is compatible with the federal statute. The federal statute and the ordinance compliment each other and further the common legislative policy of restricting or prohibiting animal fighting.

Also, the ordinance does not restrict interstate travel. It is a reasonable exercise of police power and is not in conflict with the Fourteenth Amendment of the United State Constitution.

POINT V

SECTION 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE IS A REASONABLE USE OF THE CITY'S POLICE POWER FOR THE PUBLIC WELFARE, AND DOES NOT VIOLATE ARTICLE I, § 1 OF THE UTAH CONSTITUTION.

Section 23-5-104(8) of the West Valley City Municipal Code is a reasonable exercise of the City's police power, and furthers the legislative purpose of preventing cockfighting. In reasonable exercises of the City's police power, the City may prohibit or restrict an individual's right to possess or use property.

Constitutional provisions, such as Article I, § 1 of the Utah Constitution, which relate to the rights of individuals to acquire or possess property, must be construed and applied in light of the police power of the City as expressed by its legislative body.

ARGUMENT

POINT I

IT IS WITHIN THE POWER OF WEST VALLEY CITY TO ENACT § 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE, WHICH PROHIBITS ANY PERSON FROM RAISING, KEEPING OR USING ANY FOWL OR BIRD FOR THE PURPOSE OF FIGHTING.

It is clearly within the authority of the West Valley City Council, as legislative body for West Valley City, to enact an ordinance which makes it unlawful for any person to raise, keep or use any bird or fowl for the purpose of fighting. Streeter's argument that the City has exceeded its authority is premised on the incorrect notion that West Valley City is a chartered city subject to the language of Article XI, § 5 of the Utah Constitution. This premise is plainly incorrect, since West Valley City is not a chartered city. (See Addendum A, Articles of Incorporation of West Valley City.)

West Valley City is an incorporated city created pursuant to the provisions of Utah Code Ann. § 10-2-101, et seq. It derives its authority from the provisions of Title 10 of the Utah Code, which apply to all municipalities except those subject to the home rule (charter cities) provisions of Article XI, § 5 of the Utah Constitution. Utah Code Ann. § 10-1-106. The City has adopted the council-manager form of government allowed under the "Optional

Forms of Municipal Government Act," Utah Code Ann. § 10-3-1201, et seq. This alternative form of government retains all the rights, powers and duties granted to other municipalities of the same class. Utah Code Ann. § 10-3-1205. In West Valley City's form of government, it is the City Council which performs the legislative function and has the responsibility for passing City ordinances. Utah Code Ann. § 10-3-1210. The City Council's authority to enact § 23-5-104(8) of the West Valley City Municipal Code, making it unlawful to raise, keep or use birds or fowl for the purpose of fighting, is based both upon specific grants of power and a general grant of power contained in Title 10 of the Utah Code.

First, in Utah Code Ann. § 10-8-47, the Legislature specifically grants cities the authority to prevent cockfights. This section provides no restrictions or limits on the manner in which cockfights are to be prevented. Clearly, the manner in which cockfights are prevented is left to the discretion of the city.

The second specific grant of authority is contained in Utah Code Ann. § 10-8-59, which grants cities the authority to prohibit cruelty to animals. Again, it is clearly left to the discretion of the cities how they wish to implement such a prohibition.

Finally, Utah Code Ann. § 10-8-84 provides that a city:

. . . may pass all ordinances and rules, an [and] make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants,

and for the protection of property in the city . . .

This general grant of authority, often referred to as a "general welfare" clause, grants West Valley City the authority to enact such ordinances as it feels are necessary for the good of its citizens. This general welfare clause provides the City with a basis for the use of its police power in the best interests of its citizens.

Ordinances which are enacted pursuant to a city's police power are presumed to be valid. *Redwood Gym v. Salt Lake County Commission*, 624 P.2d 1138, 1143 (Utah 1981). General welfare clauses, in particular, should be liberally construed so that a municipality has wide discretion in the exercise of its police power. *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980).

Streeter misleads the court on the current state of Utah law when he states, "The police powers of West Valley City are strictly limited to those expressly granted by state constitution or statute." (Appellant's Brief, p. 13.) As authority for that proposition, he cites *Nance v. Mayflower Tavern, Inc.*, 150 P.2d 773 (Utah 1944) and *Salt Lake City v. Sutter*, 216 P. 234 (Utah 1923). (Appellant's Brief, p. 13.) These two cases relied on what was known as the "Dillon Rule." The Dillon Rule, which was a very restrictive view of the powers of cities, was repudiated by the Utah Supreme Court in the 1980 *Hutchinson* decision cited above. The *Hutchinson* court stated that, "The Dillon Rule of strict construction is antithetical to effective and efficient local and state government." *Hutchinson*, 624 P.2d, at 1126. The court also

wrote, "For the reasons stated herein, we expressly abandon the rule of strict construction of municipal and county powers insofar as it has heretofore had a basis in Utah law. *Hutchinson*, 624 P.2d, at 1119 (footnote 3). The cases that Streeter relies upon in his argument are virtually all pre-*Hutchinson* "Dillon Rule" cases. In fact, many cases that Streeter cites, i.e., *Nance*; *Sutter*; *Parker v. Provo City Corp.*, 543 P.2d 796 (Utah 1975); *Stevenson v. Salt Lake City*, 317 P.2d 597 (Utah 1957); and *American Fork City v. Robinson*, 292 P. 249 (Utah 1930), are all cited in *Hutchinson* as examples of the use of the now defunct "Dillon Rule."

The *Hutchinson* decision provides the current Utah law with respect to the police power of local governments. In determining that general welfare grants of authority should be liberally construed, the court stated:

When the state has granted general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, i.e., providing for the public safety, health, morals and welfare. [citation omitted] And the courts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitution of this state or of the United States.

Hutchinson, 624 P.2d, at 1126. With regard to specific grants of authority, the court stated that, "Specific grants should generally be construed with reasonable latitude in light of the broad language of the general welfare clause which may supplement the

power found in a specific delegation." *Hutchinson*, 624 P.2d, at 1126.

As stated in the above quotation from the *Hutchinson* case, courts will not interfere with the legislative body's use of police power unless it is arbitrary or prohibited by or inconsistent with law or the State or Federal Constitution. Whether or not it is inconsistent with federal law or the Utah Constitution is discussed elsewhere in this Brief. Streeter has advanced no argument or authority which indicates that it is prohibited by or inconsistent with State statutes. Therefore, the question is whether or not the statute enacted by the West Valley City Council, § 23-5-104(8), is arbitrary.

The section at issue is clearly not arbitrary, and, as *Hutchinson* requires, it is reasonably related to providing for the public safety, health, morals and welfare. *Hutchinson*, 624 P.2d, at 1126. The ordinance specifically relates to and furthers the goal of the City to prevent cockfights. Since the City has a specific grant of power to prevent cockfights (Utah Code Ann. § 10-8-47), it naturally follows that it is within the City's power to prohibit activities which support cockfighting or facilitate cockfighting. This is a logical and reasonable way for the City to further its legislative purpose of preventing cockfighting. It is certainly not an unusual use of police power. For example, while in pursuit of the legislative purpose of prohibiting the use of illegal drugs, it is also clearly within the government's power to prohibit activities which support or facilitate drug use.

Therefore, statutes have been enacted which prohibit the possession of drugs or the possession of drug paraphernalia, regardless of actual use.

Suppression of closely related activities and the necessary instruments of cockfighting clearly bears a reasonable relationship to preventing the undesired conduct. The Supreme Court of Illinois addressed this question in the case of *Illinois Gamefowl Breeders Association v. Block*, 389 N.E.2d 529 (Ill. 1979). In that case, the court stated that:

We believe the prohibitions contained in subsections (a) and (c), e.g., owning, breeding, training, selling or transporting, are reasonably related to the proper governmental purpose of eliminating the evils associated with animal fighting. Clearly, the legislature intended to strengthen the ban on animal fighting by making it illegal to knowingly engage in the supporting activities which make animal fighting possible, and the prohibitions contained in subsections (a) and (c) were intended to insure that those who wish to stage such exhibitions will not be able to procure the needed animals from local breeders.

Illinois Gamefowl Breeders Association, 389 N.E.2d, at 533. Section 23-5-104(8) of the West Valley City Municipal Code is similarly related to the valid legislative purpose of prohibiting cockfighting and the evils associated therewith.

Streeter's argument hinges entirely on the idea that West Valley City citizens can only be harmed by cockfighting if they witness it; therefore, the only reasonable regulations are those prohibiting the actual fighting. (Appellant's Brief, p. 15; also footnote 4.) This argument has no merit whatsoever. If taken to

its logical conclusion, the absurd result would be a local government's police power being restricted to controlling public events. The City could not criminalize cockfighting which took place privately and which was not "witnessed" by the public. Presumably, this would also apply to other non-publicly witnessed conduct, such as private, illegal drug use.

Streeter makes the additional argument that the West Valley City ordinance is unconstitutional as being an extraterritorial criminal statute, since cockfighting is legal in a few states. It is obvious that West Valley City cannot legislate beyond its boundaries. However, Streeter's argument is based on the supposition that it is legal to possess property in West Valley City which may be illegal to use in West Valley City, so long as there is some place where it may be lawfully used. It is not surprising that Streeter cites no authority to support this proposition, since the adoption of this argument would render many laws and ordinances unconstitutional, not just § 23-5-104(8). For example, Utah law prohibits the possession of marijuana (Utah Code Ann. § 58-37-8), but some states allow the possession of a small amount of marijuana. Just because the possession of a limited amount of marijuana may be legal elsewhere, Utah is not barred from prohibiting its possession within Utah boundaries. Another example are the provisions of the Alcoholic Beverage Control Act, which prohibit the possession of beer by the general public in containers larger than two liters. Utah Code Ann. § 32A-12-206. This statute effectively eliminated the general public's use of beer in kegs

within Utah. Obviously, most states in the United States, including Utah's surrounding states, allow beer kegs. Under Streeter's rationale, Utah would be allowed to prohibit the drinking of beer from kegs, but not allowed to prohibit the possession of a keg if the keg is to be used in a state where kegs are legal.

The unsound basis of this argument is apparent. In reality, Streeter is urging the extraterritorial application of Arizona law to West Valley City. The fact that cockfighting may be legal in Arizona has absolutely no effect outside the boundaries of Arizona, and does not impair West Valley City's ability to prescribe certain conduct within the boundaries of West Valley City.

It is clear that the enactment of § 23-5-104(8) by West Valley City is a valid exercise of the police power granted to the City by Title 10 of the Utah Code. Streeter's argument is based on an incorrect premise and outdated case law, and should be disregarded.

POINT II

SECTION 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE IS NOT VOID FOR VAGUENESS.

The void-for-vagueness doctrine requires that a statute or ordinance define an "offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Greenwood v. City of North Salt Lake, 817 P.2d 816 (Utah 1991), quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). In a vagueness challenge that does not involve constitutionally protected conduct, the court should

uphold the challenge only if the enactment is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 480, 102 S. Ct. 1186, 71 L.Ed.2d 362, 369 (1982). The "constitutionally protected conduct" referred to is limited to First Amendment conduct, which is not at issue here. *State v. Archambeau*, 820 P.2d 920, 928-footnote 16 (Utah App. 1991). Also, legislative enactments are reviewed with the presumption that they are constitutional. *Archambeau*, 820 P.2d, at 927. Section 23-5-104(8) of the West Valley City Municipal Code clearly delineates the conduct which it prohibits and is not vague or confusing on its face or in its application to Streeter.

An ordinance may be challenged both on its face and in its application. In this case, a facial attack upon the ordinance is obviously not successful. The ordinance contains no uncertain or confusing terms. The clear legislative purpose is to prohibit people from raising, keeping or using animals for the specific purpose of fighting. It is doubtful that the purpose could be written any clearer than the language of this ordinance which states, "It shall be unlawful for any person or corporation to raise, keep or use any animal, fowl or bird for the purpose of fighting or baiting . . ." Section 23-5-104(8) of the West Valley City Municipal Code.

An ordinance may also be challenged for vagueness in its application. In this type of challenge, the ordinance must be examined in light of the facts of the case. *United States v.*

Mazurie, 419 U.S. 544, 550, 42 L.Ed.2d 706, 713, 95 S. Ct. 710 (1975). In this case, Streeter argues that the ordinance lacks a scienter or intent requirement, which renders its application vague. This is simply not an accurate representation of the elements of § 23-5-104(8). The ordinance has a clear mental element requiring that the birds be raised, kept or used for the specific purpose of fighting or baiting. As was described by Judge Thorne in his Decision on the Motion to Dismiss:

In a criminal prosecution under this ordinance, the City must present sufficient proof to establish beyond a reasonable doubt the mental intent element of "... for the purpose of fighting or baiting ...". Requiring proof of a mental intent is not an unusual or suspect requirement, but in fact provides the necessary protections for "innocent" ownership.

(R-1. 45; emphasis in original.)

Streeter also argues that "a person who unknowingly possesses fowl or birds which could be used for "fighting or baiting," or which may be sold in a state where such "fighting or baiting" is legal, would be punished . . ." (Appellant's Brief, p. 23.) Besides being incorrect in light of the City's responsibility to prove the mental intent element of this ordinance, Streeter has no standing to bring such a challenge. As was set forth in the *Mazurie* case cited above, Streeter's vagueness challenge must be examined in light of the facts of his case. The Utah Supreme Court has stated, "A plaintiff who engages in some conduct that is clearly prescribed cannot complain of the vagueness of the law as applied to the conduct of others." *Greenwood*, 817 P.2d, at 820,

quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 445 U.S. 480, 494-95, 102 S. Ct. 1186, 1191, 71 L.Ed.2d 362, 369 (1982). See also, *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547, 41 L.Ed.2d 439, 458 (1974), where the court stated, "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Streeter has made no allegation that he "unknowingly" possessed birds which could be used for fighting. To the contrary, he readily admits all of the elements of the crime. He admits that he raised and kept birds in West Valley City for the purpose of fighting them in the State of Arizona. Under the facts of this case, the statute is not void in its application to Streeter, and he has admitted each and every element of the crime.

Section 23-5-104(8) of the West Valley City Municipal Code is neither vague on its face nor in its application to the Defendant, Streeter.

POINT III

SECTION 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE IS NOT UNCONSTITUTIONALLY OVER-BROAD.

Section 23-5-104(8) is clearly not over-broad, since it does not prohibit constitutionally protected activity while prohibiting unprotected behavior. *State v. Frampton*, 737 P.2d 183 (Utah 1987). The ordinance applies to those limited circumstances defined by its elements and does not sweep innocent conduct into a criminal act.

Streeter attempts to argue overbreadth by providing the court with facts other than his own. For instance, he states:

The problem with this sweeping language is that it prohibits conduct, such as the simple possession of the game birds in West Valley City, which may be utilized for legal and legitimate activities in foreign jurisdictions.

(Appellant's Brief, p. 25.) He also makes the claim that the ordinance is subject to subjective enforcement by the Animal Control Director. (Appellant's Brief, p. 26.) Streeter clearly has no standing to bring these arguments to the court. These arguments present the court with hypothetical situations that are not concerned with the facts relating to Streeter. Streeter does not contend that he simply owned game birds. Streeter's facts are that he has admitted to raising and keeping birds for the purpose of fighting. The ordinance is clearly not over-broad as it relates to those facts. A person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L.Ed.2d 830, 839 (1973).

Furthermore, Streeter's argument is not well-founded. The clear mental element of § 23-5-104(8), which requires the City to prove beyond a reasonable doubt that the birds are kept or raised "for the purpose of fighting or baiting," obviously protects those who may innocently own game fowl without such intent. Similarly, the power of the Animal Control Director to impound birds is contingent upon proof of a violation of the ordinance, which would necessarily include the mental element, thereby protecting innocent parties.

Finally, Streeter again argues that § 23-5-104(8) is an extraterritorial criminal statute. This is simply not accurate, as was discussed under Point I on pages 13 and 14.

Section 23-5-104(8) does not punish or prohibit the conduct of parties which falls outside of the specific prohibitions of the ordinance as set forth by its elements. Streeter has not shown that the element is over-broad on its face or in its application to him.

POINT IV

SECTION 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE IS NOT PREEMPTED BY THE ANIMAL WELFARE ACT AMENDMENT OF 1976, 7 U.S.C. § 2156, NOR DOES IT UNCONSTITUTIONALLY RESTRICT THE RIGHT TO TRAVEL.

As Judge Thorne found in his well reasoned Decision, the Animal Welfare Act Amendment of 1976, 7 U.S.C. § 2156 (Addendum B), which prohibits activity relating to the moving of fighting animals in interstate commerce, does not preempt § 23-5-104(8) of the West Valley City Municipal Code. Judge Thorne noted that preemption is not to be lightly presumed [*California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 107 S. Ct. 683, 93 L.Ed.2d 613, 623 (1987)]; and, after a careful analysis of the federal statute, determined that it does not directly conflict with the West Valley City ordinance. (R-1. 38-42; Addendum C)

The United States Supreme Court has stated that, "The question of whether a certain state action is preempted by federal law is one of congressional intent . . . to discern Congress' intent we examined the explicit statutory language and the structure and

purpose of the statute." *Ingersoll-Rand v. McClendon*, 498 U.S. _____, 111 S. Ct. 478, 112 L.Ed.2d 474, 483 (1990). In this case, the federal statutory language clearly expresses Congress' intent on the extent to which the Animal Welfare Act Amendment of 1976 preempts state law. Title 7, U.S.C., § 2156(h), states:

The provisions of this chapter shall not supersede or otherwise invalidate any such state, local, or municipal legislation or ordinance relating to animal fighting ventures except in case of the direct and irreconcilable conflict between any requirements thereunder and this chapter or any rule, regulation or standard hereunder.

By enacting this section, Congress reserved the individual municipality's right to regulate animal fighting, except in the case of a direct and irreconcilable conflict between the state and federal statutes. This is an indication of Congress' intent to interfere as little as possible with municipal regulation of animal fighting. In this case, Streeter has demonstrated no direct or irreconcilable conflict between the West Valley City ordinance and the federal statute.

Streeter's entire argument is based upon the notion that since Congress chose not to criminalize interstate movement of fighting game birds which are being transported to a state which allows cockfighting, Congress has thereby established a preempting right to transport birds to such states. As Judge Thorne correctly found:

Congressional decisions not to criminalize certain conduct does not mean that all such conduct is federally protected. Failure of Congress to include a "shoplifting" statute within the scheme of federal offenses does not

mean that Congress has decided to protect such activity.

(R-1. 41) There is no evidence whatsoever that Congress, by this omission in the federal criminal statute, intended to create a right to transport birds that Streeter can now rely on to preempt municipal ordinances.

Furthermore, the West Valley City ordinance is compatible with the federal statute. The legislative policy reflected by both laws is an attempt to curtail the use of animals for fighting purposes. The federal law makes it a criminal act for any person to:

. . . knowingly sell, buy, transport or deliver to another person or receive from another person for purposes of transportation, in interstate or foreign commerce, any dog or other animal for purposes of having the dog or other animal participate in an animal fighting venture.

7 U.S.C. § 2156(b) (emphasis added). The West Valley City ordinance prohibits the related but distinct conduct of a person who chooses to "raise, keep or use any animal, fowl or bird for the purpose of fighting or baiting." Section 23-5-104(8) of the West Valley City Municipal Code (emphasis added). These two laws complement each other and further the common legislative policy of restricting or prohibiting animal fighting.

There is no direct or irreconcilable conflict between § 23-5-104(8) of the West Valley City Municipal Code and 7 U.S.C. § 2156, the Animal Welfare Act Amendment of 1976. The acts are compatible, and the West Valley City ordinance is not preempted by the federal statute.

Streeter also argues that § 23-5-104(8) impermissibly infringes upon the right to travel, and therefore violates the Fourteenth Amendment of the United States Constitution. As authority for this notion, Streeter cites *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969). In *Shapiro*, however, the court rested its decision upon unjustified classifications of people with respect to a waiting period for welfare benefits. Even assuming that *Shapiro* applies to a police power case such as this (and the City contends that it does not), Streeter has not shown that the ordinance creates impermissible classifications or that he is a member of a protected class.

If Streeter's argument were taken to its logical conclusion, virtually all criminal statutes would have to be identical among the fifty states. Differences among the states would "restrict" an individual's right to travel. This argument has no merit. As the Supreme Court stated in a decision of Fourteenth Amendment liberty interests:

. . . the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391, 57 S. Ct. 578, 81 L.Ed. 703 (1936). § 23-5-104(8) is a reasonable exercise of police power that does not violate the Fourteenth Amendment.

POINT V

SECTION 23-5-104(8) OF THE WEST VALLEY CITY MUNICIPAL CODE IS A REASONABLE USE OF THE CITY'S POLICE POWER FOR THE PUBLIC WELFARE, AND DOES NOT VIOLATE ARTICLE I, § 1 OF THE UTAH CONSTITUTION.

The parties agree that where an important public interest requires the safeguarding of health, morals, safety or welfare, even the most basic property rights may be limited. (Appellant's Brief, p. 36.) Section 23-5-104(8) is a reasonable use of police power in the public interest and does not violate Streeter's constitutional property rights.

Constitutional provisions regarding the rights of acquiring, possessing and protecting property, in whatever terms expressed, must nevertheless be construed and applied in connection with the police power of the state. *State v. Briggs*, 146 P. 261, 262 (Utah 1915).

As was discussed extensively under Point I, West Valley City has both specific authority (Utah Code Ann. § 10-8-47; § 10-8-59) and authority under the general welfare provision of Utah Code Ann. § 10-8-84 to exercise its police power by preventing cockfighting and enacting ordinances for the general welfare of City citizens. In this case, Utah Code Ann. § 10-8-47 specifically granted the City the authority to prevent cockfights. As discussed under Point I, it is well within the City's police power to prohibit conduct

associated with, supporting or which may encourage or facilitate cockfighting. The specific language of Utah Code Ann. § 10-8-47 is important. It does not say that the City may punish cockfighting; but, rather, that the City may prevent it. That the City legislative body may determine it is in the public interest of the citizens of West Valley City to prevent cockfighting by prohibiting those activities which support or may contribute to cockfighting, is without question. Also, as was discussed extensively under Point I, the general welfare provision of Title 10 (Utah Code Ann. § 10-8-84) clearly provides an additional basis for use of the City's police power in this case.

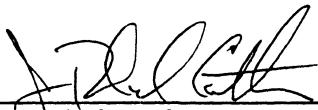
Section 23-5-104(8) is a reasonable exercise of police power, which was enacted in the same spirit and upon the same rationale as the numerous other statutes and ordinances which prohibit possession of certain property. In fact, West Valley City's ordinance is less intrusive than many. Unlike ordinances which prohibit the possession of drug paraphernalia, drugs, alcohol or other banned property, the West Valley City ordinance does not restrict simple possession; but, rather, only restricts the keeping or raising of fowl "for the purpose of fighting or baiting."

This limited intrusion upon individual property rights for the benefit and welfare of the public is a reasonable exercise of police power by a municipal legislative body, and is not in conflict with the Utah Constitution.

CONCLUSION

For the reasons advanced above, the trial court's denial of Defendant's Motion to Dismiss and denial of Defendant's Motion to Reconsider Motion to Dismiss should be affirmed in all respects, and § 23-5-104(8) of the West Valley City Municipal Code should be found constitutionally sound.

DATED this 9th day of October , 1992.



J. Richard Catten
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 9th day of October, 1992, I served four (4) copies of the attached Brief of Appellee upon Jerrald D. Conder and Michelle J. Ivie, counsel for the Appellant in this matter, by mailing said Briefs to them by first class mail, with sufficient postage prepaid, to the following address:

Jerrald D. Conder
Michelle J. Ivie
Conder & Wangsgard
4059 South 4000 West
West Valley City, Utah 84120



J. Richard Catten

ADDENDA

- Addendum A: Articles of Incorporation of West Valley City
- Addendum B: 7 U.S.C. § 2156 - Animal Fighting Venture Prohibition
- Addendum C: Trial Court Decision on Motion to Dismiss, Dated January 27, 1992
- Addendum D: Order of the Trial Court Denying the Defendant's Motion to Dismiss, Dated June 18, 1992
- Addendum E: Order of the Trial Court Denying Defendant's Motion to Reconsider Defendant's Motion to Dismiss, Dated June 18, 1992

Addendum A

Articles of Incorporation of West Valley City

West Valley City
3600 Constitution Boulevard
West Valley City, Utah 84119

CERTIFICATION

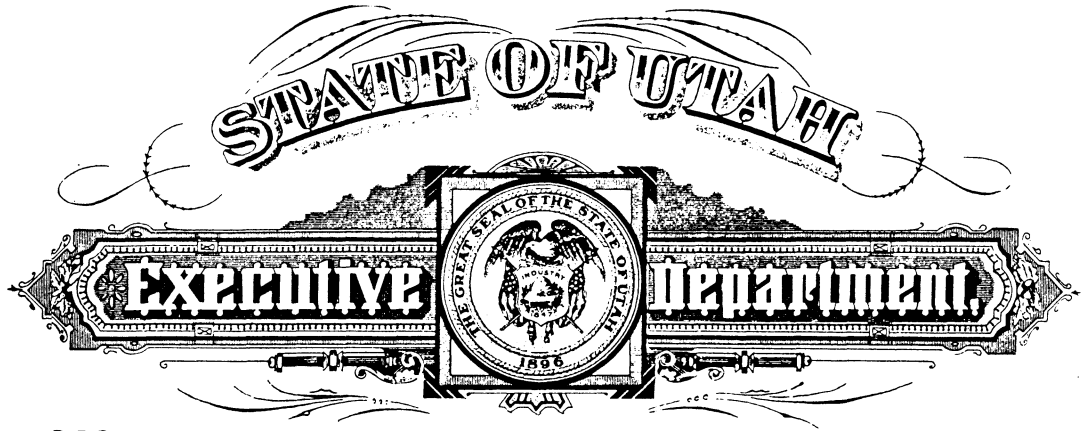
I, Karen S. Leftwich, City Recorder,
West Valley City, do hereby certify the attached Articles of
Incorporation

dated May 14, 1980, to be a true and correct copy
of said document as recorded and as on file in the West Valley City
Recorder's Office.

DATED this 6th day of October, 1992.



Karen S. Leftwich
City Recorder



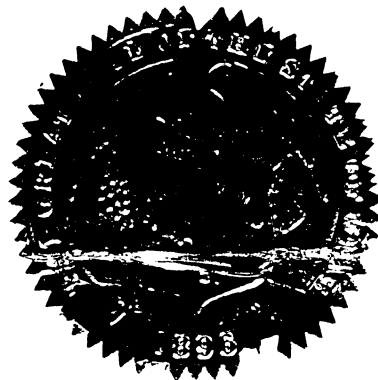
3469608

OFFICE OF THE LIEUTENANT GOVERNOR/SECRETARY OF STATE

C E R T I F I C A T E

I, DAVID S. MONSON, LIEUTENANT GOVERNOR/SECRETARY OF STATE OF THE STATE OF UTAH, DO HEREBY CERTIFY THAT there has been filed in my office a certified copy of the Articles of Incorporation of WEST VALLEY CITY, dated May 14, 1980, complying with Section 10-2-108, Utah Code Annotated, 1953, as amended 1977.

NOW, THEREFORE, in compliance with the requirements of Section 10-2-108, Utah Code Annotated 1953, as amended 1977, notice is hereby given to all whom it may concern that the attached is a true and correct copy of the Articles of Incorporation referred to above on file with the Secretary of State pertaining to WEST VALLEY CITY, a city of the second class, located in Salt Lake County, Utah. The date of incorporation is indicated to be July 1, 1980.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Utah at Salt Lake City, this 26th day of August, 1980.

DAVID S. MONSON
Lt. Governor

Janet C. Haney
Authorized Person

BOOK 5141 PAGE 865

ARTICLES OF INCORPORATION

OF

WEST VALLEY CITY

(a Municipal Corporation)

The undersigned, Henry Price, being duly elected and qualified Mayor of West Valley City does hereby certify the following:

ARTICLE I

NAME

The name of the City is WEST VALLEY CITY.

ARTICLE II

DESCRIPTION

The geographical description of WEST VALLEY CITY is:

Beginning at the S. W. Corner Section 3, T. 2. S., R. 2 W., S. L. B. and M., and running thence North along the West line of said Section 3 and the West lines of Section 34, 27 and 22, T. 1 S., R. 2 W., S. L. B. and M., to the N. W. Corner of said Section 22; thence East along the North line of Sections 22, 23 and 24, T. 1 S., R. 2 W., S. L. B. and M., to the Salt Lake City Boundary line which is located on the N. E. Corner of said Section 24; thence South 50.0 feet along the Boundary of Salt Lake City; thence East along the Boundary line of Salt Lake City which line is 50 feet South of the North line of Sections 19, 20 and 21, T. 1 S., R. 1 W., S. L. B. and M., to a point located 783.0 feet East of the West line of said Section 21; thence South 69.35 feet, more or less, along said boundary of Salt Lake City to a point 783.0 feet East and 119.35 feet South from the N. W. Corner of said Section 21; thence continuing East along the boundary of Salt Lake City to a point 117.83 feet South and 224.35 feet West of the North $\frac{1}{4}$ Corner of Section 22, T. 1 S., R. 1 W., S. L. B. and M.; thence S $2^{\circ} 13'$ E 90.39 feet along the Salt Lake City boundary; thence N $89^{\circ} 41'$ E 277.70 feet along the boundary of Salt Lake City; thence S $0^{\circ} 04' 26''$ W along the East line of Redwood road and the present boundary of Salt Lake City 142.69 feet to the North Right of Way line of State Highway No. 201 (21st South Freeway); thence along said North line and boundary of Salt Lake City as follows, N $88^{\circ} 41'$

82.00 feet to a point of a 2914.79 foot radius curve to the right; thence Easterly along the arc of said curve 487.53 feet to a point of tangency; thence S 81° 44' 431.27 feet to a point of a 5729.58 foot radius curve to the left; thence Easterly along the arc of said curve 481.67 feet to a point of tangency; thence S 86° 89' E 497.56 feet; thence N 88° 46' 11" E 700 feet; thence N 87° 13' 41" E 1130 feet, more or less, to the centerline of the

Jordan River; thence leaving said North Right of Way Southerly along the centerline of the Jordan River to the intersection of the Jordan River with the centerline of the Meadow Brook Expressway, which line is 1650 feet, more or less, North and 1650 feet, more or less, East of the S. W. Corner of Section 35, T. 1 S., R. 1 W., S. L. B. and M.; thence in a South Westerly direction along the centerline of the Meadow Brook Expressway to the midpoint of the South line of Section 34, T. 1 S., R. 1 W., S. L. B. and M., which midpoint is the South ½ Corner of said Section 34; thence West along the South Line of Sections 34 and 33, T. 1 S., R. 1 W., S. L. B. and M., to the intersection of the midpoint of 2700 West Street, which intersection point is the South ½ Corner of said Section 33; thence South along the midpoint of 2700 South Street 5280 feet, more or less, to the South ½ Corner of Section 4, T. 2 S., R. 1 W., S. L. B. and M.; thence West along the South lines of Sections 4, 5 and 6, T. 2 S., R. 1 W., S. L. B. and M., and the South lines of Sections 1, 2 and 3, T. 2 S., R. 2 W., S. L. B. and M., to the Southwest Corner of said Section 3 and point of beginning.

ARTICLE III

CLASSIFICATION

According to population, WEST VALLEY CITY is a city of the second class.

ARTICLE IV

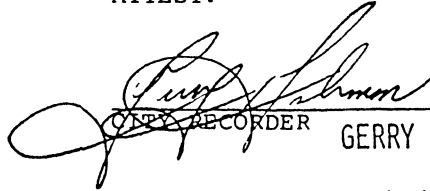
DATE OF INCORPORATION

WEST VALLEY CITY shall become incorporated as a municipal corporation at 9:00 o'clock a.m. July 1, 1980.

DATED this 14 day of MAY, 1980.

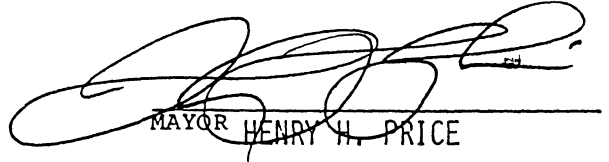

MAYOR HENRY H. PRICE

ATTEST:

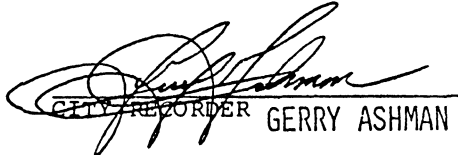

NOTARY RECORDER GERRY ASHMAN

HENRY PRICE, being duly sworn, deposes and says:

That he now and at all times mentioned in the foregoing Articles of Incorporation was the Mayor of WEST VALLEY CITY, that he has read the Articles, that the statements made therein are true to the best of his knowledge and belief and that the signature contained therein is the signature of said Mayor of WEST VALLEY CITY.

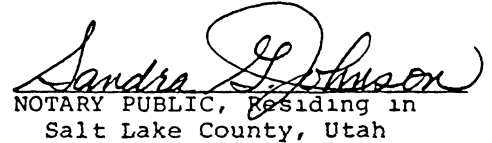

MAYOR HENRY H. PRICE

ATTEST:


CITY RECORDER GERRY ASHMAN

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On the 14th day of May, 1980, personally appeared before me HENRY PRICE, the signer of the within instrument, who duly acknowledged to me that he executed the same.


NOTARY PUBLIC, Residing in
Salt Lake County, Utah

My Commission Expires:

2/14/82

Addendum B

7 U.S.C. § 2156 -
Animal Fighting Venture Prohibition

§ 2156. Animal fighting venture prohibition

(a) Sponsoring or exhibiting animal in any fighting venture

It shall be unlawful for any person to knowingly sponsor or exhibit an animal in any animal fighting venture to which any animal was moved in interstate or foreign commerce.

(b) Buying, selling, delivering, or transporting animals for participation in animal fighting venture

It shall be unlawful for any person to knowingly sell, buy, transport, or deliver to another person or receive from another person for purposes of transportation, in interstate or foreign commerce, any dog or other animal for purposes of having the dog or other animal participate in an animal fighting venture.

(c) Use of Postal Service or other interstate instrumentality for promoting or furthering animal fighting venture

It shall be unlawful for any person to knowingly use the mail service of the United States Postal Service or any interstate instrumentality for purposes of promoting or in any other manner fur-

thering an animal fighting venture except as performed outside the limits of the States of the United States.

(d) Violation of State law

Notwithstanding the provisions of subsections (a), (b), or (c) of this section, the activities prohibited by such subsections shall be unlawful with respect to fighting ventures involving live birds only if the fight is to take place in a State where it would be in violation of the laws thereof.

(e) Penalties

Any person who violates subsection (a), (b), or (c) of this section shall be fined not more than \$5,000 or imprisoned for not more than 1 year, or both, for each such violation.

(f) Investigation of violations by Secretary; assistance by other federal agencies; issuance of search warrant; forfeiture; costs recoverable in forfeiture or civil action

The Secretary or any other person authorized by him shall make such investigations as the Secretary deems necessary to determine whether any person has violated or is violating any provision of this section, and the Secretary may obtain the assistance of the Federal Bureau of Investigation, the Department of the Treasury, or other law enforcement agencies of the United States, and State and local governmental agencies, in the conduct of such investigations, under cooperative agreements with such agencies. A warrant to search for and seize any animal which there is probable cause to believe was involved in any violation of this section may be issued by any judge of the United States or of a State court of record or by a United States magistrate within the district wherein the animal sought is located. Any United States marshal or any person authorized under this section to conduct investigations may apply for and execute any such warrant, and any animal seized under such a warrant shall be held by the United States marshal or other authorized person pending disposition thereof by the court in accordance with this subsection. Necessary care including veterinary treatment shall be provided while the animals are so held in custody. Any animal involved in any violation of this section shall be liable to be proceeded against and forfeited to the United States at any time on complaint filed in any United States district court or other court of the United States for any jurisdiction in which the animal is found and upon a judgment of forfeiture shall be disposed of by sale for lawful purposes or by other humane means, as the court may direct. Costs incurred by the United States for care of animals seized and forfeited under this section shall be recoverable from the owner of the animals if he appears in such forfeiture proceeding or

in a separate civil action brought in the jurisdiction in which the owner is found, resides, or transacts business.

(g) Definitions

For purposes of this section—

(1) the term “animal fighting venture” means any event which involves a fight between at least two animals and is conducted for purposes of sport, wagering, or entertainment except that the term “animal fighting venture” shall not be deemed to include any activity the primary purpose of which involves the use of one or more animals in hunting another animal or animals, such as waterfowl, bird, raccoon, or fox hunting;

(2) the term “interstate or foreign commerce” means—

(A) any movement between any place in a State to any place in another State or between places in the same State through another State; or

(B) any movement from a foreign country into any State,

(3) the term “interstate instrumentality” means telegraph, telephone, radio, or television operating in interstate or foreign commerce;

(4) the term “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(5) the term “animal” means any live bird, or any live dog or other mammal, except man; and

(6) the conduct by any person of any activity prohibited by this section shall not render such person subject to the other sections of this chapter as a dealer, exhibitor, or otherwise.

(h) Conflict with State law

The provisions of this chapter shall not supersede or otherwise invalidate any such State, local, or municipal legislation or ordinance relating to animal fighting ventures except in case of a direct and irreconcilable conflict between any requirements thereunder and this chapter or any rule, regulation, or standard hereunder.

(Pub.L. 89-544, § 26(a)-(h)(1), as added Pub.L. 94-279, § 17, Apr. 22, 1976, 90 Stat. 421.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Act. House Report No. 94-801, House Conference Report No. 94-976, see 1976 U.S.Code Cong. and Adm.News, p. 758.

Codifications

Section consists of subsecs. (a) to (h)(1) to section 26 of Pub.L. 89-544, as added by Pub.L. 94-279. Subsec. (h)(2) of section 26 of Pub.L. 89-544, as added

Addendum C

Trial Court Decision on Motion to Dismiss,
Dated January 27, 1992

IN THE THIRD CIRCUIT COURT, WEST VALLEY DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WEST VALLEY CITY,	*	
	*	DECISION ON MOTION
Plaintiff,	*	TO DISMISS
	*	
vs.	*	
	*	Case No. 901001586
DENNIS STREETER,	*	
	*	
Defendant.	*	
	*	

This matter arose as a result of a DUI stop on May 27, 1990. On May 30, 1990, Dennis Streeter was charged with six counts of Cruelty to Animals in violation of 23-5-104 of the Revised West Valley City Ordinances.¹ Defendant and counsel, Kirk Bennett, appeared and entered pleas of not guilty to all charges. A civil petition was then filed against Mr. Streeter by West Valley City. The petition sought the disposition of the animals that were the subject of the cruelty charges. The DUI and other criminal matters were resolved and defendant was sentenced on those matters on January 7, 1991.

Defendant filed a Motion to Dismiss the animal cruelty charges on several grounds. These included 1) Federal

¹. The defendant was charged with raising, keeping or using poultry for the purpose of fighting or baiting. As background for consideration of the arguments made by defendant the court assumes that the Defendant was returning from having fought the birds in Arizona, where such fighting is legal. (These facts having been established at hearings on the other criminal charges for which defendant has already been sentenced.)

Preemption, 2) an Unconstitutional deprivation of property, and 3) violations of Constitutional Due Process, alleging both vagueness and overbreadth. Defendant, through his attorney Kirk Bennett, and Plaintiff West Valley City, through Keith Stoney the city prosecutor, filed memorandum supporting and opposing the requested dismissal. The civil petition awaits the resolution of the criminal cruelty charges.

PREEMPTION

Defendant argues that the applicable West Valley City Ordinance² has been preempted by Congressional legislation. In 1976, Congress enacted the Animal Welfare Act Amendment of 1976, 7 U.S.C. 2156, which prohibited activities related to the moving of fighting animals in interstate commerce.³ Violations were to carry penalties up to \$5,000 and one year in jail.⁴ Within the criminal proscription a specific exception was made for live

². Section 23-5-108 (8) (a) of the Revised Ordinances of West Valley City. "It shall be unlawful for any person or corporation to raise, keep or use any animal, fowl or bird for the purposes of fighting or baiting;..."

³. Title 7 U.S.C. Section 2156, Animal fighting venture prohibition.

(a) "It shall be unlawful for any person to knowingly sponsor or exhibit an animal in any animal fighting venture to which any animal was moved in interstate or foreign commerce."

(b) "It shall be unlawful for any person to knowingly sell, buy, transport, or deliver to another person or receive from another person for purposes of transportation, in interstate or foreign commerce, any dog or other animal for purposes of having the dog or other animal participate in an animal fighting venture."

⁴. Title 7 U.S.C. Section 2156 (e).

birds, if the fight was to take place in a state that did not prohibit such fights.⁵

Defendant cites sections of the Congressional Record to demonstrate that the intent of Congress was to allow cock fighting because of its historical and traditional roots. As Plaintiff West Valley City has pointed out, and my research confirmed, the citations to these quotes are inaccurate or misleading and raise a number of questions.⁶

California Federal Savings and Loan Association v. Guerra, 93 L. Ed. 2d 613 (1987), sets forth the task of a court when deciding issues of preemption. "In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution (the) sole task is to ascertain the intent of Congress."⁷ The United States Supreme Court has set out in Guerra three methods whereby Congressional intent may be determined when deciding whether federal action will supersede state enactments. First, Congress may expressly state that it is preempting state law. Second, Congressional

⁵. Title 7 U.S.C. Section 2156 (d). "Notwithstanding the provisions of subsections (a), (b), or (c) of the section, the activities prohibited by such subsections shall be unlawful with respect to fighting ventures involving live birds only if the fight is to take place in a State where it would be in violation of the laws thereof."

⁶. Even after the inaccuracy of the citations was pointed out by Plaintiff in its memorandum, Defendant has not supplied the Court with proper citations. This has caused additional difficulties because of the lack of resource materials readily available to the Court in the West Valley location.

⁷. 93 L. Ed. 2d 613, 623 (1987).

intent to preempt may be inferred where the scheme of federal regulation is so extensive or comprehensive as to leave no room for supplementary state action. Third, where Congress has not completely displaced state regulation, federal law will still preempt state action if either a) it is physically impossible to comply with both federal and state requirements or b) where state law becomes an obstacle to the achievement of Congressional objectives.⁸

Rather than arguing application of one of these methods of determining "preemptive intent," Defendant simply argues that Congress " . . . implicitly determined that the states were not to interfere with the breeding and training of gamecocks for transportation into jurisdictions where cockfighting was lawful."⁹ Plaintiff argues that an analysis of the "Interstate and Foreign commerce" language demonstrates that Congress resolved not to meddle in the affairs of States.¹⁰ Neither of these arguments is convincing.¹¹

⁸. Ibid.

⁹. Defendant's Memorandum In Support Of Motion To Dismiss, p. 4.

¹⁰. Plaintiff's Memorandum In Opposition, p. 14.

¹¹. Particularly, when the argument cites Interstate and Foreign Commerce language as evidencing Congressional intent not to interfere with States. Rather, such federal intrusion into otherwise state matters rests almost solely on just such commerce grounds.

PREEMPTION ANALYSIS

The Congressional action that Defendant relies upon is a criminal statute that sets forth penalties for specific conduct. Congress determined that activities related to the interstate transportation of most fighting animals should be federal crimes. Congress chose, however, not to make all activities connected with the shipment of fighting birds criminal offenses.

Such actions do not evidence a Congressional intent to so occupy a field of regulation as to preempt state regulation. Congressional decisions not to criminalize certain conduct does not mean that all such conduct is federally protected. Failure of Congress to include a "shoplifting" statute within its scheme of federal offenses does not mean that Congress has decided to protect such activity. There is absolutely no evidence that Congress intended to preempt states, and their political subdivisions, in the area of animal welfare. Rather, the purpose seems to have been one of attempting to make enforcement of animal cruelty statutes easier.

Congress has certainly been capable in the past of clearly announcing that certain conduct is protected. When such protections have been established, however, Congress does not generally utilize a "pregnant omission" in a criminal statute to extend such new protection. Instead, Congress declares a clear

purpose and may then legislate criminal sanctions for failure to honor the protected classes of conduct.¹²

In light of the Supreme Court's warning in Guerra that " . . .preemption is not to be lightly presumed"¹³ this Court is unwilling to determine that the failure of Congress to criminalize certain conduct is the equivalent of extending federal protection to such conduct. A decision of Congress not to criminalize all interstate shipments of fighting birds does not extend federal protection to the possession and training of such birds for fighting purposes.

Title 7 U.S.C. Section 2156 (d) does not preempt state or city regulation of fighting cocks.

UNCONSTITUTIONAL DEPRIVATION OF PROPERTY

Defendant contends that he is entitled to a hearing prior to being deprived of a significant property interest. Defendant argues that because the West Valley ordinance doesn't provide for such a hearing before prohibiting the possession of birds for the purpose of fighting, that the ordinance is therefore unconstitutional. Defendant argues that the ordinance violates due process by depriving him of his property right in the fighting cocks. West Valley City responds that proper passage of a criminal statute is in itself a form of due process compliance. Consideration in the legislative process builds in notice and an

¹². See the history of the various voting rights acts and other civil rights legislation.

¹³. 93 L. Ed. 2d 613, 623 (1987).

opportunity to be heard on the issue that is subject to legislative prohibition.

The City has filed a civil action to determine the appropriate disposition of the animals pursuant to the zoning violations alleged as well as the animal cruelty provisions. Defendant has been, and will continue to be, afforded written notice and an opportunity to respond, including the right to present evidence and question witnesses in a judicial proceeding, before a disposition is made of his interest in the subject animals. Certainly, such action meets the requirements of due process.

Additionally, the Defendant has presented no law indicating that there is a significant property interest, requiring individual advance notice whenever specific items of property are about to become prohibited property. The Court is aware of no rulings requiring such advance hearings when dealing with proscribed birds, drugs, gambling devices, or whatever.

The West Valley City Ordinance prohibiting the raising or training of fighting animals is not an unconstitutional deprivation of property.

OVERBREADTH

Defendant argues that there must be a distinction between raising and breeding animals for "legal" fights¹⁴ and those intended for illegitimate contests. Defendant argues that the

¹⁴. Those destined for fights in states or countries where such fights are legal.

City ordinance is overbroad because it fails to distinguish between animals fought, or intended to be fought, in states where such fighting is legal and those fought in states where all animal fights are illegal.¹⁵ Defendant cites no authority for such a proposition. Defendant also alleges that the ordinance interferes with people who raise such birds without intent to fight them anywhere. Defendant believes that the ordinance will be, or may be, enforced against such owners.

The City contends that both the actual fighting of birds as well as the training of birds to fight to be equally cruel. The City also argues that the quality of the conduct does not change substantially whether the fighting is in "legal" states or "illegal" states. The City believes that it is entitled to prohibit activities that promote such conduct whenever they occur within its city limits. The City also contends that the statutory requirement of intent found in the ordinance, " . . . for the purpose of fighting or baiting . . .,"¹⁶ is sufficient to protect innocent pet owners, etc.

This Court is not convinced that because particular conduct may be legal in another state or country, that the instrumentalities of such conduct must necessarily not be subject

¹⁵. Defendant's Memorandum in Support, p. 6. Defendant's argument seems hinged on the supposition that there is a protected right to possess property which is illegal to use in the state in which it is found so long as there is someplace where it may be lawfully used. No authority has been presented to support such a contention.

¹⁶. West Valley City Revised Ordinance 23-5-104 (8).

to criminal prohibitions in Utah. Clearly, the legislative authority of the State, and by derivation that of the City, is not limited by the choices made by similar entities elsewhere. Nor is it a convincing argument that innocent owners may be swept up in the "broad brush" of the statute. In a criminal prosecution under this ordinance, the City must present sufficient proof to establish beyond a reasonable doubt the mental intent element of " . . .for the purpose of fighting or baiting . . ." Requiring proof of a mental intent is not an unusual or suspect requirement, but in fact provides the necessary protections for "innocent" ownership.

The West Valley City Ordinance is not unconstitutionally overbroad.

VAGUENESS

Defendant asserts that the City ordinance is unconstitutionally vague; that a person of ordinary intelligence would not know what conduct is permissible and what conduct prohibited.

The ordinance clearly allows raising birds for any purpose other than the purpose of fighting or baiting. On its face the ordinance is not vague.

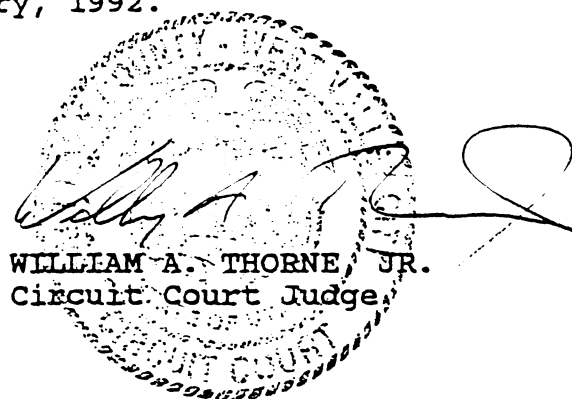
CONCLUSION

The Motion to Dismiss is denied. The West Valley City Ordinance is not preempted by a Title 7 U.S.C. Section 2156 prohibiting interstate activity related to fighting animals, but specifically exempting from coverage birds shipped for fighting

in "legal" states. The ordinance is neither overbroad nor vague. An ordinance prohibiting raising or training birds for the purpose of fighting is not an unconstitutional deprivation of property.

The motions are denied and the matter shall be set immediately for trial.

Dated this 27 day of January, 1992.



WILLIAM A. THORNE, JR.
Circuit Court Judge

Addendum D

Order of the Trial Court Denying
Defendant's Motion to Dismiss,
Dated June 18, 1992

Michelle J. Ivie (#5723)
of CONDER & WANGSGARD
Attorneys for Defendant
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West Valley City, Utah 84120
Telephone: (801) 967-5500
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FILED
JUN 13 AM 9:52
CLERK OF THE DISTRICT COURT
WEST VALLEY DEPT.

IN THE THIRD CIRCUIT COURT, WEST VALLEY DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WEST VALLEY CITY,)	
)	O R D E R
Plaintiff,)	
)	
vs.)	Case No. 901001677 MC
)	Case No. 901001586 MC
DENNIS L. STREETER,)	
)	
Defendant.)	

Based upon the Motion to Dismiss filed by defendant and the opposing memoranda on file herein, and for other good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

That Defendant's Motion to Dismiss is herewith denied based upon the grounds and for the reasons more particularly set forth in the Decision on Motion to Dismiss filed by this court on January 27, 1992.

DATED this 8 day of June, 1992.

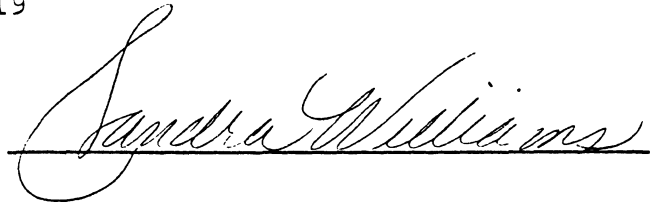
BY THE COURT:


WILLIAM A. THORNE
Circuit Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of June, 1992, I caused to be mailed, first-class, postage prepaid, a true and correct copy of the foregoing ORDER to the following counsel of record:

Keith L. Stoney
West Valley City Prosecutor
3600 South 2700 West
West Valley City, Utah 84119

A handwritten signature in cursive script, reading "Sandra Williams", is written over a horizontal line.

Addendum E

Order of the Trial Court Denying
Defendant's Motion to Reconsider
Defendant's Motion to Dismiss,
Dated June 18, 1992

WV
Michelle J. Ivie (#5723)
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West Valley City, Utah 84120
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Fax: (801) 967-5563

FILED
12 JUN 13 AM 8:52
CIRCUIT COURT
WEST VALLEY DEPT.

IN THE THIRD CIRCUIT COURT, WEST VALLEY DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WEST VALLEY CITY,)	
)	O R D E R
Plaintiff,)	
)	
vs.)	Case No. 901001677 MC
)	Case No. 901001586 MC
DENNIS L. STREETER,)	
)	
Defendant.)	


Based upon defendant's Motion to Reconsider Motion to Dismiss which was filed March 30, 1992, and argument proffered by counsel for defendant at trial that same day, and for other good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Defendant's Motion to Reconsider Motion to Dismiss is hereby denied.

DATED this 8 day of June, 1992.

BY THE COURT:


WILLIAM A. THORNE
CIRCUIT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of June, 1992, I caused to be mailed, first-class, postage prepaid, a true and correct copy of the foregoing ORDER to the following counsel of record:

Keith L. Stoney
West Valley City Prosecutor
3600 South 2700 West
West Valley City, Utah 84119

